

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

In re the Marriage of:

No. 37997-0-II

ARIKA L. R. TONEY,

Appellant,

and

TIMOTHY J. AHEREN III,

Respondent.

UNPUBLISHED OPINION

Houghton, P.J. — Arika Toney appeals from a trial court order entering a satisfaction of judgment and clarifying an ambiguous parenting plan provision. She argues that the trial court erred in entering the order in her absence because she did not receive proper service of process and the trial court thus lacked personal jurisdiction over her. We affirm and award attorney fees for filing a frivolous appeal.

**FACTS**

Toney and Aheren have one child, an 11-year-old daughter. On August 28, 2007, the trial court ordered Aheren to pay Toney \$1,617 back child support for September 2006 to July 2007. Two days later, Aheren gave Toney a \$1,617 check in payment. Toney refused to sign a satisfaction of judgment, claiming the payment a gift. Toney also refused to sign a tax exemption form allowing Aheren to claim his daughter as a dependent.

On March 21, 2008,<sup>1</sup> Aheren filed a motion asking the trial court to enter a satisfaction of judgment and ordering Toney to sign the tax form. After a process server failed in numerous attempts to serve Toney with notice of a hearing on the pending action and after Toney failed to return phone call messages about the matter, Aheren's counsel struck the hearing.

On May 2, 2008, Aheren filed an amended motion. In the second motion, he sought the same relief but also asked the trial court to clarify a vague provision in the parenting plan, allowing for visitation during the upcoming Memorial Day weekend. The Post Office returned copies of the hearing documents sent to Toney's last address filed in the court.

Aheren's counsel then mailed another copy of the notice of a May 21, 2008 hearing to Toney's apartment address. He sent the amended motion to Toney's residence via the United States Postal Service Express Mail.<sup>2</sup> The Post Office sent a confirmation stating that the documents were received by "R. Garcia for A. Toney" on May 17, 2008. Clerk's Papers (CP) at 31.

The trial court heard the matter as scheduled on May 21, but in Toney's absence. At that time, the trial court found,

It is now 9:15 AM on Wednesday, May 21st. This is the time that was set for hearing. It was scheduled to [begin] at 8:45 AM. Let the record reflect that Ms. Toney is not present. In reviewing the efforts to serve, I find that the pleadings – the first batch of pleadings which included the motion were mailed by United States Postal Service on May 1 to Ms. Toney at the address that she had given to the Court on April 18th, 2008. So less than twelve days later she was mailed these documents at her address that she had said twelve days earlier was in fact her address. I also find that telephone contact was made; messages were left on the phone number that she gave in writing in a letter that was filed with your pleadings

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<sup>1</sup> During the relevant proceedings below, counsel did not represent Toney.

<sup>2</sup> Aheren's counsel filed a CR 5(b)(2)(B) form certificate attesting to his service by mail.

indicating that that was indeed her correct phone number. She also gave that phone number to the Court on April 18th, 2008. Then there were at least eight attempts to make personal service at the address given by Ms. Toney and what is interesting about those eight attempts – actually nine attempts. One of them was made on April 18th, the very day that she has represented to the Court that this was her address and one was made on April 19th, the day after that she has represented to the Court that this was her address. The process server indicates under oath that he heard movement from inside but “yet refused to answer the door.” And “apartment manager confirmed Toney to be current tenant.” Those are the attempts to make service. The rule requires that service is – “service shall be made upon the attorney unless service upon the party himself is ordered by the Court.” Well, in this case there is no attorney. She is her own attorney. And service is permitted under Rule 5(b) (1) to be made “by mailing at last known address copies of the documents.” And service by mail by the U.S. Postal Service is permitted under Rule 5(2) (a) and we have a representation of counsel – well what we have first of all we have on file a document indicating that – that this – that this second batch of pleadings were mailed on May 16th, 2008 and were actually delivered on May 17th, 11:38 in the morning. I will – this document, however is not signed under penalty of perjury. It seems to be if it is going to be authenticated, it should be. But the bottom line is is that I find that extraordinary efforts were made to provide Ms. Toney with the proper service and that she was given actual service – or actual notice, excuse me.

Report of Proceedings at 13-15.

After finding proper service and personal jurisdiction, the trial court decided the substantive issues. On June 4, it entered an order clarifying the parenting plan on the Memorial Day visitation. It also found that Aheren had not given Toney a \$1,617 gift, but rather had paid back child support, and it ordered a satisfaction of judgment. It further determined that Aheren had the right to have Toney sign an Internal Revenue Service Form 8332, indicating that he could claim his daughter as a dependent.

On June 9, 2008, Toney moved for reconsideration. She asked the trial court to vacate its order based on lack of personal jurisdiction. The trial court denied her motion and she appeals.

## ANALYSIS

### Personal Jurisdiction

Toney first contends that Aheren did not properly serve her, rendering any later action null and void.<sup>3</sup> We disagree.

The trial court found that Aheren properly served Toney under CR 5(b)(1), 5(b)(2)(A), and 5(b)(2)(B). Those rules apply to service of pleadings other than original service of process. CR 5(b)(2) allows service by mail at the home of a party. A party may prove service by mail by written acknowledgement of service, by affidavit of the person who mailed the papers, or by an attorney's certificate. CR 5.

We review a trial court's findings of fact and conclusions of law to determine whether substantial evidence in the record supports the factual findings and whether those findings, in turn, support its conclusions of law. *810 Props. v. Jump*, 141 Wn. App. 688, 695, 170 P.3d 1209 (2007). The trial court found service by mail proper under CR 5(b)(1), 5(b)(2), and impliedly under CR 5(2)(A). Those rules provide in pertinent part,

"Service upon . . . a party shall be made by delivering a copy to him or by mailing it to him at his last known address . . . ." CR 5(b)(1); "If service is made by mail, the papers shall be deposited in the post office addressed to the person on whom they are being served . . . ." CR 5(b)(2)(A); "Proof of service of all papers permitted to be mailed may be . . . by certificate of an attorney. CR 5(b)(2)(B).

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<sup>3</sup> As a preliminary matter we note that "[w]here the court has personal and subject matter jurisdiction, a procedural irregularity renders a judgment voidable," not null and void. *In the Matter of the Marriage of Chai/Kong*, 122 Wn. App. 247, 254, 93 P.3d 936 (2004).

Here, Aheren's counsel sent all necessary documents and certified this along with a description of prior attempts to serve Toney. Substantial evidence supports the trial court's finding of proper service. Toney's argument fails.<sup>4</sup>

#### ATTORNEY FEES

Aheren requests attorney fees on appeal under RAP 18.1<sup>5</sup> and 18.9(a). He argues that the appeal lacks any merit, requiring compensation for his having to respond. We agree and award him attorney fees under RAP 18.1 and 18.9(a).

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

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Houghton, P.J.

We concur:

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Hunt, J.

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<sup>4</sup> Because we hold that Toney received proper service, we do not further address whether she can show the "existence of a strong or virtually conclusive defense, or, alternatively, a prima facie defense to the plaintiff's claims," in order to justify "vacat[ing] the default judgment." *TMT Bear Creek Shopping Center, Inc. v. Petco Animal Supplies, Inc.*, 140 Wn. App. 191, 201, 165 P.3d 1271 (2007); *Beckett v. Cosby*, 73 Wn.2d 825, 827-28, 440 P.2d 831 (1968). We also do not address the 2008 Memorial Day visitation issue as it is moot.

<sup>5</sup> Aheren properly filed a financial declaration under this rule.

No. 37997-0-II

Quinn-Brintnall, J.